Nos. 735-736

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Supreme Court of the United States

OCTOBER TERM 1948

◆

PETER NIZNIK

Petitioner

v.

THE UNITED STATES OF AMERICA

Respondent

◆

RAYMOND COMODOR

Petitioner

v.

THE UNITED STATES OF AMERICA

Respondent

◆

Joint Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

HAYDEN C. COVINGTON
VICTOR F. SCHMIDT
GROVER C. POWELL

Counsel for Petitioner

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TO THE SUPREME COURT OF THE UNITED STATES:

Peter Niznik and Raymond Comodor petition this Court for a writ of certiorari and show unto the Court as follows:

1. *Opinion of the court below.*

The opinion of the Court of Appeals, reversing the judgments of conviction in these cases, is not reported. The joint opinion appears in the record. [*14-26*] [1]

2. *Jurisdiction.*

The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court on May 7, 1934.

3. *Timeliness of this petition.*

Judgment ordering a new trial was rendered and entered March 7, 1949. [*13*] Time for filing this petition for writ of certiorari was extended by order of this Court to April 25, 1949. [*27*]

4. *Statutes and Regulations involved.*

Sections 3 (a), 5 (d), 10 (a) and 11 of the Selective Training and Service Act of 1940, as amended, (50 U. S. C. App. §§ 301-318) are drawn in question here, as well as Sections 615.82, 623.1, 623.2, 625.1, 625.2, 625.3, 626.1-626.14, 627.11-627.14, 629.1, 629.2 (c), 651.1-651.8, 651.10, 652.1, 652.11, 652.12 and 653.11 of the Selective Service Regulations (32 C. F. R. Supp. 601.5 *et seq.*) promulgated by the President under said Act.

[1] Bracketed figures appearing herein refer to pages of printed transcript of record. Bracketed figures in *italics* refer to pages of printed supplemental record.

5. *Questions presented.*

(1) Did the court below err in ordering a new trial when the evidence was fully developed and indisputably showed that there was a violation of petitioners' rights to procedural due process by the local board, requiring a judgment of acquittal?

(2) Did the court below err in not holding that the failure of the local board to reduce to writing the oral testimony given by petitioners was a violation of petitioners' rights to procedural due process, contrary to the Selective Training and Service Act of 1940, and the Regulations promulgated thereunder?

Statement of Cases

Form of Action

These criminal actions were instituted in the district court by return of indictments charging petitioners with violation of the Selective Training and Service Act of 1940, as amended, and the Regulations thereunder. [12, 23] Pursuant to stipulation, the cases were consolidated for trial before the court and a jury. [14, 25] At the close of all the evidence, petitioners moved for a judgment of acquittal, which was renewed following the verdict. [14, 25] The motion was overruled. [14, 25] Petitioners were each sentenced to two years and ordered committed to the custody of the Attorney General of the United States. [15, 26]

Appeals were duly taken from the judgments of conviction to the court of appeals. [16, 27] In due course the cases were consolidated and jointly argued, submitted and decided, resulting in an order for a new trial.

FACTS

Niznik Case

Peter Niznik, following his registration with Local Board No. 18, McKees Rocks, Pennsylvania, was mailed a Selective Service Questionnaire by his local board on September 8, 1942. [64, 156] He timely filed the questionnaire [161], claiming exemption from training and service as a student preparing for the ministry. [160] He stated that he was conscientiously opposed to participation in war in any form. [160] He had completed eight years of elementary school and four years of high school, and could read and write the English language. [157] He showed that his occupation was that of a laborer, scraping concrete off form boxes; that he had been doing this work for thirty days; that he had worked at previous secular work from June to August 1942. [158-159] He indicated that his usual occupation for which he was fitted was that of laborer. [159]

He also filed a Special Form for Conscientious Objector, setting forth in detail his "Religious Training and Beliefs", supporting his objections to participation in war in any form. [170-174]

On January 6, 1943, he filed with the local board a letter requesting a personal appearance, and in which he renewed his claim for ministerial exemption. [163] On or about January 12, 1943, his request was granted and he had a hearing. [64] This was for the purpose of discussing orally his ministerial status, to present additional evidence relative thereto and to call attention to the documentary evidence in his file. [64] This request for personal appearance before the local board was in response to a postcard mailed by the board requesting Niznik to inform the board as to "any change of status." [162]

Upon his personal appearance, Niznik was introduced to the board members by the clerk. Niznik informed the board that he was there to discuss his ministerial status

and claim for Class IV-D. He gave the board members extensive evidence orally as to his schooling for the ministry and his practical training in applied field missionary work. He explained that he had been expelled from grade school and denied the privilege of playing football in high school because of his refusal to salute the flag because of his belief that his doing so would violate God's law as expressed in the Bible at Exodus 20: 3-5. [65-66]

The members of the local board informed him at such personal appearance that they were not giving any of Jehovah's witnesses a ministerial classification of IV-D because "Jehovah's witnesses only stir up trouble amongst the people with their teachings" [66] and that anyone who did not salute the flag or stand when the national anthem was played had no rights and "should be thrown out of the country." [66]

He orally presented new evidence showing that he had been ordained; that he spent many hours in the field missionary work as a minister each week; that he conducted Bible studies as a minister; spent regularly each month from 40 to 50 hours in study preparation for his ministerial activity and over 60 hours in the performance of actual preaching as a minister. [66-67, 78]

He told the local board that he had quit secular work with the concrete company and had gone to work at a paper mill, but that his secular work did not interfere with the regular performance of his preaching work. He reminded the local board that Christ Jesus was a carpenter, the apostle Peter a fisherman and that the apostle Paul was a tent-maker to support himself in the ministry. [67] He explained extensively to the board about the time he devoted to his course of study as a part of his ministerial work. [67-68]

Niznik was before the local board on the occasion of his personal appearance about 45 minutes, during which time he gave them much additional information and new facts

that did not appear in his selective service file. [68] At the conclusion of the personal appearance, he was informed that he would receive a classification card. [68]

On January 21, 1943, he was directed to submit to a physical examination on January 26, 1943. [162] Thereafter, on February 4, 1943, he was classified in I-A by the local board [161], thus being denied his ministerial claim and made subject to training and service in the armed forces. [68]

On February 15, 1943, he appealed to the board of appeal, from the determination of the local board. [161] While the cover sheet was being prepared for forwarding to the board of appeal, Niznik gathered some affidavits from several persons to augment his claim for exemption as a minister of religion and to prove his ordination. These papers he filed with the local board on February 22, 1943. [164-167] On March 1, 1943, the clerk of the local board prepared a covering letter transmitting to the board of appeals the cover sheet of Niznik containing all of the papers filed by him. [168] The Government Appeal Agent of the local board incorporated in the file his letter of March 4, 1943, stating, among other things, that Niznik had given many reasons for not serving in the armed forces, that Niznik was recognized as a minister of the gospel and "he is entitled to all the privileges and exemption according to the preaching of the Gospel." [169]

On March 9, 1943, the board of appeal "determined by a vote of 5 to 0 that apart from the question of conscientious objection, registrant should be placed in Class I-A." [162] On March 10, 1943, the board of appeal referred his file to the Department of Justice for a hearing and report upon conscientious objection of Niznik to participation in war in any form. [174-175]

On May 6, 1943, pursuant to a notice, Niznik appeared before a hearing officer of the Department of Justice at Pittsburgh, Pennsylvania. Three witnesses appeared with

him. [69, 176] On May 13, 1943, the hearing officer made his report on the hearing. [175-182] The written report contains the summary of evidence given by Niznik upon the question of his objections.[2] The report showed that Niznik had been one of Jehovah's witnesses for many years; that he was consecrated in 1942; that he worked regularly as one of Jehovah's witnesses, attended meetings; had been trained as one of Jehovah's witnesses since childhood; that his parents had brought him up to be one of Jehovah's witnesses; that he was known in school to be one of Jehovah's witnesses; that he refused to salute the flag and stand when the national anthem was played, resulting in his being denied, in high school, the privilege of playing on the high-school football team; that he was actively engaged in the work of Jehovah's witnesses; was sincere in his objection to participation in war in any form and that there was nothing in his life inconsistent with his beliefs. [175-182] The report recommended that his status as a conscientious objector be recognized. [182] This report was, together with the cover sheet of registrant, sent to the board of appeal by the Department of Justice on July 5, 1943. [184-185]

On August 17, 1943, pursuant to a unanimous vote by the board of appeal on July 20, 1943, to classify Niznik in Class IV-E the local board mailed classification notice to Niznik, thus making him liable for service for work of national importance. [69, 162]

Upon receipt of such notice, Niznik wrote to the local board requesting that it withhold further action pending review by the State Director and National Director of Selective Service, [69, 186] whom he was writing with request

[2] It should be observed that the report by the hearing officer followed the denial of the claim for exemption as a minister by the local board and the board of appeal and that it was not in any way considered as bearing upon the claim for exemption as a minister, but only upon the status of the registrant as a conscientious objector.

that an appeal be taken to the President so as to grant his claimed exemption as a minister of religion. [69] His requests to the local board, State and National Directors were denied. [69]

On October 8, 1943, following a physical examination, Niznik was found physically unfit for training and service, resulting in the local board placing him in Class IV-F. [69, 162] This disability classification was continued until February 25, 1946, when the local board placed Niznik in Class I-A. [162] Within the time required by law, Niznik requested a personal appearance. The appearance was granted for March 11, 1946. [162]

Niznik appeared and gave extensive oral testimony, substantially the same as that previously given by him at his appearance in 1943. Additionally he informed the board that he had been especially trained to give impromptu talks and extemporaneous talks and was schooled in voice training to aid in his preaching activity. Additionally his special training included a study of the books of the Bible, Bible characters and many other subjects usually taught ministers. [70]

Upon that occasion the local board members said that the organization of Jehovah's witnesses was not a charitable organization and, as far as the members of the board were concerned, even though Niznik was a minister, they "weren't going to give me a 4-D" because Jehovah's witnesses were not "an orthodox religious organization, like the others in existence." [70-71] Then the members said that they were through with him and would give no further consideration to this case. [71]

Upon the occasion of this personal appearance, Niznik submitted new and additional evidence that did not appear in the file in writing. He showed all that he had been doing

as a minister during the time intervening from 1943 to 1946. [71-72]

The local board absolutely failed to pay any attention to his evidence and would not listen to him, part of the time doing their desk work while he was talking. [72]

Following his personal appearance, Niznik appealed to the board of appeal on March 11, 1946. [162, 187] The board of appeal changed his classification, on March 22, 1946, from I-A to IV-E, but continued the denial of his exempt claim as a minister of religion. [162, 187] The notice of classification was mailed by the local board on March 27, 1946. [187]

On April 24, 1946, the Pennsylvania State Director of Selective Service wrote the local board, stating, among other things, that the "reason for another preinduction physical examination is that 90 days have elapsed since his previous examination." [188] Thereafter, on May 8, 1946, Niznik was examined and found qualified for service pursuant to the Regulations and was mailed a notice of his acceptability which stated that he was "Subject to complete re-examination if presented for induction after 90 days." [189]

On August 20, 1946, Niznik was assigned to work of national importance. [190-191][3] On August 29, 1946, he was ordered to report to his local board on September 10, 1946, for transportation to a civilian public service camp. [191-193] He reported to the camp in Gatlinburg, Tennessee, at 4 p.m. on September 12, 1946, and left at 4:15 p.m. on the same date. [73, 162, 193, 195]

[3] Note that he was not given another pre-induction physical examination prior to being ordered to report, although more than 90 days had elapsed since he was examined on a pre-induction examination.

Comodor Case

Raymond Comodor, following his registration with Local Board No. 18, McKees Rocks, Pennsylvania, was mailed a Selective Service Questionnaire by his local board on September 2, 1942. [198] In his questionnaire, filed on September 8, 1942, he claimed exemption from training and service as a minister of religion, stating that he customarily served as a minister and had been doing so since September 8, 1940. [202] He also showed that he had a physical defect through the loss of the sight in his left eye; that he had eight years of elementary school and four years of high school; that he was employed as a gasoline filling station attendant; had worked previously as a glass worker and office worker. [199-200] He said he had conscientious objections to participation in war in any form. [202] He claimed to be exempt as a minister of religion and requested to be placed in Class IV-D. [203]

Accompanying his questionnaire was a written statement in which he explained about his preaching work and previous training in preparation for his ministry. [205-208]

On September 8, 1942, he also filed a Special Form for Conscientious Objector, giving somewhat in detail the background of his training and activity as one of Jehovah's witnesses. [209-213]

Accompanying the papers filed with the local board on September 8, 1942, were also submitted to the board three affidavits corroborating Comodor's statements in respect to his customarily serving as a minister of religion. [214-216]

On January 2, 1943, the local board placed Comodor in Class I-A, making him liable for training and service in the armed forces, and denied his claimed exemption as a minister. [81, 203] Within the time required by the Regulations, he requested a personal appearance which was granted for January 12, 1943. [81, 203, 216-217]

Upon his personal appearance before the local board,

Comodor testified that the members of the local board seemed to be amused from the start when he introduced himself and stated that he was one of Jehovah's witnesses. He said that the members laughed sneeringly at him. [82] He informed them that he believed that they had failed to consider the evidence appearing in his file; that he had additional information that he wanted to present which he felt sure would induce them to classify him as a minister. [82-83] He pointed out that since he was eleven years old he had been trained for the ministry; that he had spent many hours regularly each week studying at home and at a special preparatory school from 1935 to 1940; that in September 1940 he was ordained for the ministry. [83] He informed the board that he participated in various phases of the ministry work of Jehovah's witnesses. [84] He explained in detail about the course of study that he had undergone and the number of Bible studies that he conducted in the homes of the people. [84-85]

During the time that he attempted to offer proof in support of his ministry, the local board told him that they would not allow him to read from or refer to God's Word, the Bible. [84-85] He called their attention to the fact that he was ordained by and recognized by the Watch Tower Bible and Tract Society and was qualified to teach and preach the Bible and the tenets of the organization. [84]

During the hearing, Comodor testified, one of the members of the board stated[4] that "Any body that refuses to salute the flag, and anyone who refuses to stand up at the National Anthem, or defend their country, they don't have any right under the law." [85] Comodor replied, "You're supposed to be a judge, you're supposed to be neutral, you're supposed to weigh the evidence, you've formed an opinion before I came here because you talked to Peter [Niznik]." [85]

[4] Observe that Comodor had not informed the board that he did not salute the flag or stand up at the playing of the national anthem.

Comodor told the board, when they injected the flag salute issue into the case, "I don't salute the flag, not because I don't respect it, I respect the flag more than those other fellows [at school]; I respect the nation as a whole, because I'm glad to live in it, I'm free. I'm able to believe the way I want." And then one of the members said, "Well, the way we feel, we'd like to put you all in a boat and out in the middle of the ocean and sink the boat, all you Jehovah's witnesses." [86]

Comodor further testified that he told the board that "there isn't anything in my file that disproves the fact that I am a minister." One of the members thereupon said, "we don't have any time for you. We don't even give you a 4-E. . . . or a I-A-O, we're going to give you a I-A. We don't have any time for you, be on your way." [87] Comodor thereupon told the members that regardless of what they did to him, he had but one thing to do and that is to preach the Gospel. [87]

Comodor said that his personal appearance lasted about 45 minutes and that he presented new evidence orally which was in addition to that filed with his papers at the local board. [87-88]

The board determined on the day of his personal appearance to continue him in Class I-A. [204] On January 25, 1943, he was mailed a notice of Continuation of Classification in I-A. [204] Within the time allowed by the regulations, Comodor appealed to the board of appeal. [87, 204] In harmony with the regulations permitting a statement to be filed with the appeal setting forth the respects in which he believes the local board erred in classifying him, he filed, on February 8, 1943, an extensive written argument which, however, did not include all the oral evidence that he had given to the members of the local board at the personal appearance, but explained Biblically his stand upon the compulsory military service. In it he stated that the board

had committed great wrong against him by denying his claim for Class IV-D. [217-221]

On February 13, 1943, the local board forwarded Comodor's cover sheet to the board of appeal. [222] The board of appeal unanimously decided, on February 16, 1943, to place the registrant in Class I-A, but referred his file to the Department of Justice for advisory recommendation on the matter of conscientious objection. [204, 223]

On May 20, 1943, pursuant to notice, a hearing was had before a hearing officer of the Department of Justice, at which Comodor and three witnesses appeared to give testimony concerning his conscientious objection to participating in war in any form. [88] The report of the hearing officer showed that Comodor was a minister of Jehovah's witnesses since September 1940, associated with the West End Unit of the Pittsburgh Company of Jehovah's witnesses; that he was mature and of good appearance and demeanor. The report gave the summary of the three witnesses. It contained the report of the agent of the F. B. I. who investigated Comodor's objections to participation in war, which showed that Comodor was sincere, of excellent character, and an active worker of good behavior; that while Comodor was attending high school he was known to be an exceptionally bright and good student, although he did not attend the school assemblies because of his conscientious refusal to salute the flag. [225-232]

The report was forwarded by the Department of Justice to the board of appeal on July 2, 1943. [233] On July 13, 1943, the board of appeal classified Comodor in IV-E, making him liable for service for work of national importance. [89, 204]

He requested the Director of Selective Service to take action to review his classification on the ground that he was erroneously classified, but this request was denied. [235]

Thereafter he was rejected on a preinduction physical

examination due to having no sight in one of his eyes, and he was placed in Class IV-F by the local board. [89] He remained in Class IV-F until April 1945, when he was again placed in Class I-A by the local board. Following this he timely made a written request for a personal appearance and hearing before the local board. [236] The local board, on May 8, 1945, recognized his request for a hearing, subject to his being found acceptable upon a preinduction physical examination. Upon the examination, he was found to be unacceptable and the local board thereupon returned him to Class IV-F. On November 13, 1945, following another preinduction physical examination, he was found acceptable for limited service. [237] He was thereupon retained in Class IV-F, but, on February 25, 1946, reclassified to I-A-B. [90, 253]

A personal appearance was had before the local board on March 18, 1946. [90, 251] Comodor filed a lengthy letter with the local board at the time of his personal appearance calling attention to additional information as to his ministry and attaching several affidavits and other documentary evidence containing details of his preaching activity and his standing and recognition as an ordained minister. [91, 238-251] Also he offered additional oral evidence about a special course in what is known as the Theocratic Ministry School that he was pursuing to further qualify him as a minister. [91] He told the board on this occasion that he had been appointed to the position of assistant to the presiding minister or elder of the congregation of Jehovah's witnesses and that, by reason thereof, he occupied a position toward the congregation as do the orthodox clergy. [91-92] The board members then attempted to cut him off from speaking, saying, "Well, we don't have time for you. . . . We can't give you a 4-D. We're not going to give any of Jehovah's witnesses a 4-D, no matter what your file proves, we're not going to give any of you a 4-D." [92-93] This was said by Mr. Keller, acting for the board. [93-94]

Comodor said that they did not judicially consider his case upon the personal appearance because they had formed an opinion. When he first entered, they said to him, "Well, we know who you are, we know your work, we're not going to have time for you." [94]

Upon the conclusion of this personal appearance on March 18, 1946, he was told by the board that he was not recognized by the board as an ordained minister and that, accordingly, he would remain in Class I-A-B. [251] Comodor appealed to the board of appeal on the same day. [94-95, 204, 251] The file was forwarded on April 1, 1946, to the board of appeal which board reclassified Comodor to IV-E on April 5, 1946. [253] On April 9, 1946, the local board was directed to notify Comodor of this classification. [252]

Comodor was thereafter directed to submit to a pre-induction physical examination on May 8, 1946. [254] Upon such examination he was found to be qualified for military service, "subject to complete re-examination if presented for induction after 90 days." [254]

On August 20, 1946, he was assigned to work of national importance. [254-255] On August 29, 1946, he was ordered to report at the local board on September 10, 1946, for transportation to Civilian Public Service Camp No. 108, Gatlinburg, Tennessee. [257-258] He appeared, calling attention of the clerk to the fact that he should not have been ordered to report because of poor physical condition and, furthermore, because "on my certificate of fitness it says that I am supposed to be re-examined after 90 days, after the past 90 days, it's past 90 days, way past 90 days and I didn't get another physical, since the last time I took one." [96] The clerk replied, "Oh, it don't mean anything." [96] Comodor replied that "it's stamped in red letters on there." [96]

Comodor proceeded to the camp at Gatlinburg, Tennessee, arrived there at 4 p.m. September 12, 1946, and left at 4:15 p.m. on the same date. [96-97, 258-259]

How Issues Raised

At the close of all the evidence, the petitioners made their joint motion for judgment of acquittal on the grounds that there was a denial of procedural due process by the local board in that its members were prejudiced and failed to give a full and fair hearing as well as refused to reduce to writing the oral testimony given by petitioners upon their personal appearances before the local board. [98-106]

Following the verdict of guilty, petitioners moved again for a judgment of acquittal. [114-115] The renewed motion for judgment of acquittal was based on the same grounds as that made at the close of the evidence before the case was submitted to the jury. [114-115]

These issues properly raised the questions presented upon appeal to the court of appeals and support the questions presented upon this petition for writ of certiorari.

Specifications of Error

The Court of Appeals for the Sixth Circuit erred—

(1) in granting a new trial rather than directing the entry of a judgment of acquittal; .

(2) in holding that it was not necessary for the local board to reduce to writing the oral testimony given by the petitioners upon their personal appearances before the local board.

Reasons Relied on for Granting Writ

The failure of the court below to direct the entry of a judgment of acquittal, rather than order a new trial, conflicts with *United States* v. *Stiles,* 169 F. 2d 455 (C.A. 3d).

An important question of procedure in the trial of criminal cases, involving construction and interpretation of Rule 29 of the Federal Rules of Criminal Procedure, which has not been but which should be decided by this Court, is presented here.

An important question of administrative law, which has not been but which should be decided by this Court, is also presented.

Since the undisputed evidence shows that there was exhaustive oral evidence given by the petitioners before the local board upon their personal appearances, it was the duty of the local board to reduce such testimony to writing, and its failure to do so constituted a denial of a full and fair hearing before the board of appeal, contrary to the Act and Regulations.

Rule 29 (a) of the Federal Rules of Criminal Procedure allows the trial judge to render a judgment of acquittal "if the evidence is insufficient to sustain a conviction of such offense or offenses." Rule 29 (b) provides that "If the motion is denied and the case is submitted to the jury, the motion may be renewed within 5 days after the jury is discharged and may include in the alternative a motion for a new trial. If a verdict of guilty is returned the court may on such motion set aside the verdict and order a new trial or enter judgment of acquittal."

Rule 29 of the Federal Rules of Criminal Procedure is similar to Rule 50 of the Federal Rules of Civil Procedure. This Court had before it Rule 50 (b) of the Federal Rules of Civil Procedure in *Cone* v. *West Virginia Pulp & Paper Co.,* 330 U. S. 212. In that decision the Court reversed the judgment of the court of appeals which directed the entry

of a judgment notwithstanding the verdict. The reason the Court held the appellate court did not have authority to render a judgment notwithstanding the verdict was because "The respondent failed to submit a motion for judgment notwithstanding the verdict to the trial judge in order that he might exercise his discretionary power to determine whether there should be such a judgment, a dismissal or a new trial. In the absence of such a motion, we think the appellate court was without power to direct the District Court to enter judgment contrary to the one it had permitted to stand." *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U. S. 212, at pp. 217-218.

This case, therefore, presents to the Court a situation that was entirely different from that found in the *Cone* case.

It has been held that, upon reversing a judgment of conviction, the appellate court may, if the evidence is not sufficient to warrant the submission of the question of defendant's guilt to the jury, remand the cause "with directions to discharge the appellant." *Cemonte* v. *United States*, 89 F. 2d 363.

The decision of the court below, therefore, conflicts with the holding just referred to, because the evidence is undisputed and no good purpose would be served by having a new trial.

The court below said: "If, on the event of a retrial, appellants' testimony is disputed, the case should be submitted to a jury. If appellants' testimony and evidence on retrial should be substantially the same as on the former trial, and should be uncontradicted, appellants would be entitled to an acquittal." [*26*]

It was entirely out of order for the court below to assume that, on a retrial, testimony of the petitioners would be disputed. The Government failed to call witnesses to rebut the testimony given by petitioners on the trial in the district court. Failure of the Government to call members of the local board to give testimony, contradictory of peti-

tioners', constitutes an admission that if such witnesses had been called their testimony would have been consistent with the testimony of petitioners. *Interstate Circuit* v. *United States,* 306 U. S. 208, 225-226.

In *United States* v. *Zieber,* 161 F. 2d 90 (C. A. 3d), there was a conflict in the testimony which warranted the court in holding that the issue was one of fact for the determination of the jury. This case is similar to *United States* v. *Stiles,* 169 F. 2d 455 (C. A. 3d), and *United States* v. *Garvin,* 71 F. Supp. 545 (W. D. Pa.).

The court below erroneously held that it was not necessary for the local board to reduce to writing the oral testimony given to the local board by petitioners on personal appearances. The undisputed evidence shows that new and additional oral testimony was submitted and considered by the local board.

The Regulations require that the local board reduce to writing and place in the registrant's file all oral evidence submitted by him pertaining to his occupational status and classification. Section 615.82 provides, *inter alia,* "Every paper pertaining to the registrant, except his Registration Card (Form 1) . . . shall be filed in his Cover Sheet (Form 53)."

"The registrant's classification shall be made solely on the basis of the official forms of the Selective Service System and such other written information as may be contained in his file; . . . Oral information should not be considered unless it is summarized in writing and the summary placed in the registrant's file. Under no circumstances should the local board rely upon information received by a member personally unless such information is reduced to writing and placed in the registrant's file." (Section 623.2. See also Section 625.2 (b), Regulations.)

"If any facts considered by the local board do not appear in the written information in the file, the local board shall

prepare and place in the file a written summary of such facts." (Section 627.13 (b))

Section 627.13 (b) of the Regulations required the local board to "carefully check the registrant's file to make certain that all steps required by the regulations have been taken and that the record is complete." The local board disregarded the Regulations and acted in complete defiance thereof, thus flouting the law and showing utter contempt for the petitioners' right under the Regulations.

The Regulations intend that the classification upon appeal shall be *de novo*. The board of appeal and the President do not have an opportunity to permit the registrant to appear before them personally; they are confined in their consideration to the record made in writing. If the local board did not comply with the Regulations requiring it to make a full record of all the facts and evidence considered by it, the appeal agency of the Selective Service System would be entirely at the mercy of the local board. If a record was not made of all the facts and evidence which properly entered into the judgment of the local board, then the board of appeal would not be in as good a position to pass on the case as was the local board. The Regulations contemplate that the local board shall make a record of all the evidence considered by it so that the board of appeal shall be in equally as good a position to pass upon the classification of a registrant as the local board.

The undisputed evidence showed that the local board in each case failed to reduce to writing and place in each petitioner's file vital oral evidence submitted by him at personal appearances relative to his status under the Act. When he was at the hearing he offered extensive additional oral evidence which was concededly received by the local board. The local board, although it did hear the oral evidence, did not reduce it to writing and place it in the cover sheet as required by the Regulations. The board of appeal did not see or have an opportunity to consider all the addi-

tional evidence. It did not know of the action of the local board in withholding vital oral evidence received and considered.

The claim for exemption was denied on appeal *de novo* solely because the local board failed to include the new oral evidence in the cover sheet. It must be conclusively presumed that the classification of each petitioner would have been different and he would as a minister have been exempted from training and service had the local board complied with the Regulations and included a summary of his oral evidence in the file.

Previously in the written information each had not informed the local board of the amount of time devoted to his ministry. The questionnaire showed that he did secular work during the week. In view of this showing it may well have been that the board of appeal concluded that he did not devote very much time to his ministry. Therefore it was highly important that he show the amount of time that he actually devoted to his ministry.

The time each devoted to his ministry per month is a very substantial time. It is as much as, if not more than, orthodox clergymen devote to their ministerial functions. Therefore the local board should have reduced this to writing for the benefit of the board of appeal. It was wrong to say it was not "new information".

While it was corroborative, it was not merely cumulative. It was in fact "new information" which had not previously appeared in the file and which does not now appear in the file, although it was given to the local board and considered by it upon the personal appearance.

Furthermore the local board made a great deal over the fact that petitioners did not attend a theological school. The board apparently was of the opinion that they had not received adequate training in the school attended in preparation for the ministry. The papers filed with the local board did not go into an explanation of the course of study and the

precise nature of petitioners' preparation for the ministry. They offered extensive evidence in respect to the course of study pursued. This oral evidence showed that they pursued a course of study that was at least equivalent to that pursued by many orthodox clergy in preparation for their ministry. Therefore this evidence, although corroborative, was not cumulative but was entirely "new information".

The construction here contended for by petitioners is that if there is any "further information" submitted it is "new information". This analogy is corroborated by the Regulations. See Section 625.2 (b), providing, *inter alia:* "The registrant may present such *further information* as he believes will assist the local board in determining his proper classification." (Emphasis added)

There is absolutely no dispute in the evidence as to what took place before the local board on the occasion that each petitioner appeared before it. Therefore the evidence is undisputed that each offered "new information". The evidence is further undisputed that the local board failed to reduce to writing any of this "new information" and send it to the board of appeal. There being undisputed evidence showing that there was a violation of the Regulations by the local board, it was the duty of the court below to find that the order supporting the indictment in each case was lawless and void. Accordingly each judgment below should be reversed with instructions to order the indictment dismissed. *Estep* v. *United States,* 327 U. S. 114, 121; *United States* v. *Zieber,* 161 F. 2d 90 (C. A. 3d); *United States* v. *Stiles,* 169 F. 2d 455 (C. A. 3d); *United States* v. *Garvin,* 71 F. Supp. 545 (W. D. Pa.).

Conclusion

For the reasons stated, your petitioners pray that this Court issue a writ of certiorari to the Court of Appeals for the Sixth Circuit directing such court to certify to this Court for review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the cases as numbered and entitled on the docket of said court; and that this Court reverse the judgment of said court of appeals ordering a new trial and order a judgment of acquittal entered in each case, as was done in the case of *United States* v. *Stiles* (169 F. 2d 455), where the court said: "The judgment of the district court will be reversed and the cause will be remanded with directions to enter a judgment of acquittal." Petitioners pray for such other and further relief in the premises as to this Court may seem just and proper in the circumstances.

PETER NIZNIK
RAYMOND COMODOR
Petitioners

By

HAYDEN C. COVINGTON
117 Adams Street
Brooklyn 1, New York

VICTOR F. SCHMIDT
8469 Pine Road
Rossmoyne, Ohio

GROVER C. POWELL
203 Spring Street
Atlanta 3, Georgia

Counsel for Petitioners

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 734

DAVID RAE PETERSON, PETITIONER

v.

UNITED STATES OF AMERICA

No. 735

PETER NIZNIK, PETITIONER

v.

UNITED STATES OF AMERICA

No. 736

RAYMOND COMODOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals in No. 734 (Supp. R. 6-13)[1] is reported at 173 F. 2d 111. The opinion of the Court of Appeals in Nos. 735 and 736 (Supp. R. 14-26) is reported at 173 F. 2d 328.

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[1] The joint record for all three cases is in two volumes, one containing the proceedings in the District Court, and the other, not consecutively paginated, the proceedings in the Court of Appeals. The former is referred to herein by "R", the latter, by "Supp. R."

JURISDICTION

The judgments of the Court of Appeals were entered March 7, 1949 (Supp. R. 6, 13). On March 26, 1949, Mr. Justice Reed extended the time for filing petitions for writs of certiorari to April 25, 1949 (Supp. R. 27), and the petitions were filed on April 18, 1949. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether a selective service registrant, classified as a conscientious objector, who reports to a civilian public service camp for work of national importance and departs from the camp without leave after remaining there nearly 18 months, can, in a prosecution for deserting the camp, assail the validity of the order to report on the ground that it was issued more than 90 days after his pre-induction physical examination.

2. Whether petitioners Niznik's and Comodor's local board unlawfully withheld from the appeal board pertinent information respecting their claims to exemption from service as ministers of religion by failing to reduce to writing and include in their files oral evidence, not already substantially contained in their files, presented by them to the local board on the occasions of personal appearances before it.

3. Whether, in the circumstances of this case, the Court of Appeals should have directed the entry of

judgments of acquittal as to petitioners Niznik and Comodor, rather than merely remanding the causes for a new trial.

STATEMENT

On December 2, 1946, separate indictments (R. 1, 12, 23) were filed in the District Court for the Eastern District of Tennessee, charging petitioners with having wilfully deserted from a Civilian Public Service Camp, in violation of Section 11 of the Selective Training and Service Act (50 U.S.C. App. 311). The cases were consolidated for trial (R. 35), and following a trial by jury each petitioner was found guilty (R. 114) and sentenced to two years' imprisonment (R. 4, 15, 26). On appeal to the Court of Appeals for the Sixth Circuit, petitioner Peterson's conviction was affirmed (Supp. R. 6), and petitioners Niznik's and Comodor's convictions were reversed and the causes remanded for a new trial (Supp. R. 13).[2]

It was stipulated prior to trial that each petitioner, having been classified 4-E (conscientious objector) and having reported to Civilian Public Service Camp No. 108, Gatlinburg, Tennessee, pursuant to an order to report to that camp for work of national importance, thereafter departed from the camp without authority and failed to return (R. 36-37). The sole contested issue at the

[2] Petitioners Niznik and Comodor contend in this Court that the Court of Appeals should have directed the entry of judgments of acquittal as to them (Pet. 16).

trial was the validity of the classification and order in each case (R. 37-38).

The Government rested its case on the basis of the above stipulation and petitioners' selective service files (R. 121-155, 156-195, 196-260), which were received in evidence (R. 40). Each petitioner's defense was limited to his own testimony (R. 41-62, 63-79, 79-97), by which he sought to establish the invalidity of his classification, each claiming that he should have been classified 4-D (regular or duly ordained minister of religion) and, as such, exempt from all service under the Selective Training and Service Act.

Petitioners are all Jehovah's Witnesses. Briefly summarized, their selective service files reveal the following facts:

Peterson.—Peterson filed his selective service questionnaire (R. 121-127) on August 10, 1943. He gave his age as 18 (R. 122) and "general farmer" as his occupation (R. 123). He also claimed to have been a minister since 1939 and to "have been active [in] this work" since the age of six (R. 125). He further stated that he was "conscientiously opposed to participation in war in any form" (R. 126). However, he claimed neither a minister's nor a conscientious objector's classification (4-D and 4-E, respectively), but rather an agricultural deferment (class 2-C) (R. 126). On August 20, 1943, he was classified 2-C pursuant to his request (R. 127).

On April 18, 1944, Peterson was reclassified 1-A (R. 127), and he appealed, contending that his 2-C classification should be reinstated (R. 130-132). His letter to the appeal board was devoted mainly to a description of his farming activities (R. 130-131), but incidentally mentioned his conscientious objection to military service (R. 132). The letter made no reference to his claim to be a minister. On June 10, 1944, the appeal board reinstated his 2-C classification for six months (R. 127).

On August 9, 1944, Peterson filled out and submitted a "Special Form for Conscientious Objector" (R. 134-138), and on August 11, 1944, he was reclassified 4-E by his local board (R. 128), which had in the meantime been advised by the War Food Administration that Peterson was not considered essential to agriculture (R. 139). On October 28, 1944, the appeal board also classified Peterson 4-E (R. 128, 140).

On December 12, 1944, Peterson was ordered to report for work of national importance (R. 144), and on January 6, 1945, he reported at Civilian Public Service Camp No. 108, Gatlinburg, Tennessee (R. 146). On April 15, 1946, he addressed a letter to General Hershey, Director of Selective Service (R. 150-151), requesting "release from CPS on the grounds of severe dependency hardship" (R. 151). On May 23, 1946, he addressed a telegram to Colonel Kosch, Camp Operations Division, Selective Service System, requesting a two-week emergency furlough in order that he might

return to his farm and prevent it from being "wasted in weeds" (R. 152). On June 3, 1946, he wrote to President Truman (R. 153-155), complaining that the work he was doing at the camp was of lesser national importance than the operation of his farm, and stating that "No alternative has been left for me but to walk out of the camp on a temporary A.W.O.L. to get my fields plowed * * *" (R. 155). In none of these letters did he claim or suggest that he should have been granted a minister's exemption.

Shortly thereafter, Peterson left the camp without authority and did not return (R. 1, 36-37).

Niznik.—Niznik filed his questionnaire (R. 156-161) on September 17, 1942. He gave his age as 18 (R. 157), and "laborer" as his occupation and the occupation for which he was best fitted (R. 158-159). He also claimed to be a student preparing for the ministry and to be conscientiously opposed to war in any form (R. 160). On September 24, 1942, he filled out and submitted a "Special Form for Conscientious Objector" (R. 170-174). On January 4, 1943, he asked his local board to classify him 4-D, claiming to be "an ordained minister of Jehovah God" (R. 163). On February 4, 1943, he was classified 1-A (R. 161), from which classification he appealed (*ibid.*). On July 20, 1943, in consequence of a recommendation by the Department of Justice (R. 184), following a hearing before a hearing officer (R. 175-183), the appeal

board classified him 4-E, or conscientious objector (R. 162).

On October 8, 1943, Niznik was reclassified 4-F (physically unfit) (R. 162), which classification he retained until February 25, 1946, when he was reclassified 1-A (R. 162). He again appealed, claiming exemption as a minister (R. 187), and the appeal board, on March 22, 1946, reclassified him 4-E (R. 162, 187).

On August 29, 1946, Niznik was ordered to report for work of national importance (R. 191-192). He reported at Gatlinburg Civilian Public Service Camp on September 12, 1946, and immediately thereafter departed without leave (R. 193).

Comodor.—Comodor filed his questionnaire (R. 198-203) on September 8, 1942. He gave his age as 19 (R. 199), and "gasoline station attendant" as his occupation and the occupation for which he was best fitted (R. 199-200). He also claimed to be a minister of religion and to be conscientiously opposed to war in any form (R. 202). He stated that he thought he should be classified 4-D (R. 203). On the same date he submitted a "Special Form for Conscientious Objector" (R. 209-213). On January 2, 1943, he was classified 1-A (R. 203), from which classification he appealed (R. 204), claiming exemption as a minister (R. 217-221). On July 13, 1943, in consequence of a recommendation by the Department of Justice (R. 233), following a hearing before a hearing officer (R. 224-232), the appeal

board classified him 4-E, or conscientious objector (R. 204).

At some time thereafter Comodor was reclassified 4-F (physically unfit) (see R. 89), which classification he retained until approximately April 18, 1945, when he was reclassified 1-A (R. 236). His classification was thereafter again changed by the local board to 4-F, which classification he retained until February 25, 1946, when he was put back in 1-A (R. 253). He again appealed (R. 204), claiming exemption as a minister (R. 251), and the appeal board, on April 5, 1946, again classified him 4-E (R. 253).

On August 29, 1946, Comodor was ordered to report for work of national importance (R. 257-258). He reported at Gatlinburg Civilian Public Service Camp on September 12, 1946, and immediately thereafter departed without leave (R. 258).

Other facts relevant to the validity of petitioners' final 4-E classifications will be referred to in the Argument, *infra*.

ARGUMENT

1. Petitioner Peterson, following his 1-A classification on April 18, 1944 (R. 127), was given a pre-induction physical examination on May 8, 1944, and found to be physically fit for military service (R. 132). He was thereafter reclassified 2-C on June 10, 1944 (R. 127), and 4-E on August 11, 1944 (R. 128). On December 12, 1944, he was ordered to report for work of national importance,

in accordance with his 4-E classification (R. 144). His selective service file does not indicate that he was given another pre-induction physical examination after that of April 18, 1944. Peterson contends that the fact (which we shall assume) that he was not given another physical examination within 90 days prior to the issuance of the order to report rendered the order a nullity which he was at liberty to ignore (Pet. 7-11).

The contention is clearly without merit. See *Miller* v. *United States,* 169 F. 2d 865, 866-867 (C. A. 6), where the identical contention was discussed at length and found unmeritorious. See also *United States* v. *Balogh,* 160 F. 2d 999 (C.A. 2), certiorari denied, 331 U.S. 837, where the court said, "* * * it would be absurd to say that a registrant who has been ordered to report may safely treat that order as waste paper, because he has been deprived of a second preliminary examination" (160 F. 2d at 1001). Furthermore, Peterson spent nearly 18 months in the Civilian Public Service Camp without ever having questioned the legality of the order to report on the ground on which he now challenges it. Even assuming for argument, therefore, that such an attack on the validity of the order might be meritorious if timely made, it clearly was made much too late.[3]

[3] It is to be noted that the issue here has nothing to do with the question of the point at which a registrant exhausts his administrative remedies so as to be in a position to question the validity of his classification and order to report in a judi-

2. Petitioners Niznik and Comodor were each granted two personal appearances before their local board,[4] at which they argued, unsuccessfully, that they were entitled to 4-D classifications as ministers of religion. Niznik's first appearance was on January 12, 1943, before he was initially classified (R. 64); his second appearance was on March 11, 1946 (R. 162), following his reclassification to class 1-A on February 25, 1946 (*ibid.*). Comodor's first appearance was also on January 12, 1943, shortly following his initial classification of 1-A (R. 81, 203); his second appearance was on March 18, 1946 (R. 90), following his reclassification to class 1-A on February 25, 1946 (R. 253). Each testified at the trial that, on each appearance, he orally gave the board "new information" bearing on his ministerial activities and claim to a minister's exemption, which was not already contained in his selective service file (R. 64-68, 70-72, 81-88, 90-92). They contend that the local board failed to reduce to writing such additional information and incorporate it in their files for consideration by the appeal board, and that the local board, by such failure, violated § 625.2(b)[5] of the Selec-

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cial proceeding (cf. *Estep* v. *United States*, 327 U.S. 114, with *Falbo* v. *United States*, 320 U.S. 549); the issue rather concerns the validity of the order itself.

[4] Niznik and Comodor were both registered with the same local board (R. 156, 198).

[5] Selective Service Regulation 625.2(b) (32 C.F.R., 1943 Cum. Supp., § 625.2(b)) provided: "At any such appearance [before a local board], the registrant may discuss his classi-

tive Service Regulations and thus prevented the appeal board from being in a position to pass upon their claims to ministerial status on the basis of all the information that was before the local board (Pet. 17-22).

The court below, however, after extensively reviewing what Niznik and Comodor claimed at the trial to have orally presented to the local board on the occasions of their appearances before it (Supp. R. 18-19), concluded that "Everything, substantially, that appellants claimed to have introduced as oral evidence appears to have been already in the written evidence in their files, either in letters from appellants themselves or other documentary proof filed by them—certainly, at the time of their second appearance before the local board. Nevertheless, the local board did summarize, briefly, it is true, what it purported to consider the oral information given by appellants on their appearance

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fication, may point out the class or classes in which he thinks he should have been placed, and may direct attention to any information in his file which he believes the local board has overlooked or to which he believes it has not given sufficient weight. The registrant may present such further information as he believes will assist the local board in determining his proper classification. Such information shall be in writing or, if oral, shall be summarized in writing and, in either event, shall be placed in the registrant's file. The information furnished should be as concise as possible under the circumstances. The member or members of the local board before whom the registrant appears may impose such limitations upon the time which the registrant may have for his appearance as they deem necessary."

before the board" (Supp. R. 19).[6] And later in its opinion the court below further stated that "From our inspection of the record, there was substantially no information presented orally in addition to what was already contained in the written evidence in the files which was not summarized" (Supp. R. 21).

Without attempting to cover the matters reviewed by the Court of Appeals, and to match, item by item, everything that petitioners Niznik and Comodor, according to their testimony at the trial, told their local board on the occasions of their personal appearances before it, with material already in their files at the time, we submit that the above conclusion of the Court of Appeals was entirely justified.[7]

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[6] The local board's summaries are quoted in the Court of Appeals' opinion at Supp. R. 19-20.

[7] Petitioner Peterson also makes the contention (cf. Pet. 11 with Pet. 4) that his local board failed to summarize and incorporate in his selective service file oral evidence, given on the occasion of his appearance before the board on or about August 20, 1943 (R. 45-46, 129), relating to his ministerial activities. However, unlike petitioners Niznik and Comodor, who consistently claimed exemption from all service as ministers of religion, Peterson never at any time sought exemption as a minister. His claim, from beginning to end, was that he was entitled to an agricultural, or 2-C, exemption (see pp. 4-6, *supra*). As the court below remarked (Supp. R. 12-13), "In this case, [Peterson] pointed out to the board the class in which he thought he should have been placed, and all the information he gave the board was to assist it in determining his classification as II-C. His last act before either of the boards was to appeal from the final classification of IV-E, and

3. Petitioners Niznik's and Comodor's main contention is that the Court of Appeals should have directed the entry of judgments of acquittal as to them, rather than merely remanding the causes for a new trial (Pet. 16, 17-19, 23). The pertinent facts on this issue are as follows:

Both Niznik and Comodor gave testimony at the trial which, as stated by the Court of Appeals (Supp. R. 25), if true, "clearly proved prejudice and unlawful discrimination on the part of the local board against appellants and deprived them of a hearing in accordance with the requirements of due process." The testimony in question, indicating prejudice against these petitioners based on their religious beliefs, is summarized in the opinion below at Supp. R. 24-25 and need not be repeated. As we have previously indicated (*supra*, p. 4), the Government introduced no evidence to contradict their testimony in this regard, but rested its case on the basis of the selective service files and the admitted fact that both petitioners permanently departed from the Civilian Public Service Camp

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to ask that he be again classified II-C. Under these circumstances, the contention now made that he had sought exemption from service on the ground that he was a minister of religion seems unjustified, and such a claim appears to be only an afterthought. In any event, as we have held, there is no evidence that he ever claimed such exemption before the board as a minister of religion, and the argument that the board deprived him of a fair hearing by failing to send up a record to the appeal board setting forth that he made a claim of such exemption, and thereby prevented him from being classified as a minister, is unsupported by the evidence."

without authority. Both the prosecuting attorney and the trial judge seem to have been of the view (see R. 101, 106, 110) that under *Cox* v. *United States,* 332 U.S. 442, the validity of petitioners' 4-E classifications and orders to report to camp could not be successfully assailed by testimony tending to show prejudice on the part of the local board, so long as the classifications given were not without basis in fact. Consistently with his interpretation of the *Cox* decision, the trial judge, in his charge to the jury, expressly removed from their consideration any issue as to the invalidity of the classifications and orders in consequence of prejudice on the part of the local board (R. 109-110). As a result, in view of the admitted fact that petitioners left the camp without authority, the instruction to the jury was, in practical effect, a direction to convict.[8]

The Court of Appeals, after pointing out that the trial court had misconstrued the *Cox* decision and that "when a board's action is the result of prejudice, and its classification based on discrimination, its conduct is lawless and beyond its

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[8] "* * * I instruct you that the facts stipulated in this case require you to find each of the defendants guilty of having violated an order of the Selective Service Board as charged in each of the indictments. * * *" (R. 110).

Counsel for petitioners, after first excepting to this portion of the charge on the ground that "it is the privilege of a jury to find a defendant not guilty, even when the undisputed evidence may show that he is guilty" (R. 113), subsequently withdrew his objection to the charge on this score (R. 113-114).

jurisdiction" (Supp. R. 25), concluded that "The material questions of fact [*i.e.*, whether the local board was prejudiced against Niznik and Comodor, as they had testified], as heretofore indicated, should be submitted to the jury under appropriate instructions as to the law, so that it may be determined whether the registrants have been afforded due process of law. If, on the event of a retrial, appellants' testimony is disputed, the case should be submitted to a jury. If appellants' testimony and evidence on retrial should be substantially the same as on the former trial, and should be uncontradicted, appellants would be entitled to an acquittal" (Supp. R. 26).

We submit that this disposition of the case as to Niznik and Comodor was proper. Both the trial judge and the prosecuting attorney, misconstruing the *Cox* decision, thought that petitioners' testimony attacking the impartiality of the local board was unavailing on the issue of the validity of their classifications. Now that the court below has clarified the law in this respect, it is possible that the Government will be able to present evidence, in contradiction of petitioners' testimony, which was not adduced at the trial below because deemed unnecessary. If it can do so, the jury at a new trial will be able to resolve the credibility issue under appropriate instructions. If it cannot do so, these petitioners will be entitled to the judgment of acquittal which they seek.

CONCLUSION

The petitions for writs of certiorari do not, in our opinion, present any question requiring further review by this Court. We therefore respectfully submit that they should be denied.

PHILIP B. PERLMAN,
Solicitor General.

ALEXANDER M. CAMPBELL,
Assistant Attorney General.

ROBERT S. ERDAHL,
PHILIP R. MONAHAN,
Attorneys.

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